

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 19

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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Ex parte JOHN V. MAIUCCORO

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Appeal No. 2004-0534  
Application No. 10/010,337

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ON BRIEF

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Before FRANKFORT, STAAB and BAHR, Administrative Patent Judges.  
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 11, 12 and 14-20, which are all of the claims pending in this application.<sup>1</sup>

We REVERSE.

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<sup>1</sup> Claim 13 was canceled in the amendment filed September 10, 2002 (Paper NO. 6), but this amendment has not been clerically entered.

### BACKGROUND

The appellant's invention relates to a hydrotherapy tub coplanar flow device designed to discharge air and water in a substantially coplanar flow on the inner surface of a hydrotherapy tub and a hydrotherapy tub provided with such a flow device. A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The examiner relied upon the following prior art references in rejecting the appealed claims:

Gardenier	4,953,240	Sep. 4, 1990
Mersmann	5,063,620	Nov. 12, 1991

The following rejections are before us for review.<sup>2</sup>

Claims 11, 12 and 14-20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Gardenier.

Claims 11, 12 and 14-20 stand alternately rejected under 35 U.S.C. § 103 as being unpatentable over Gardenier in view of Mersmann.

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<sup>2</sup> The objections to the specification under 37 CFR § 1.75(d) as failing to provide proper antecedent basis for language in claims 11, 16 and 20 are not rejections under 35 U.S.C. § 112, first paragraph, as appellant's brief alleges on pages 5 and 6 of the brief. While compliance with the written description requirement of 35 U.S.C. § 112, first paragraph, does not require literal support in the specification for the claim language (see In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983)), 37 CFR § 1.75(d) does provide that "the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description." This requirement of 37 CFR § 1.75(d) is separate and distinct from the written description requirement of 35 U.S.C. § 112 and objections for failure to comply therewith are issues which are not within the jurisdiction of the Board, being reviewable by petition under 37 CFR § 1.181. In re Mindick, 371 F.2d 892, 894, 152 USPQ 566, 568 (CCPA 1967).

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 15) for the examiner's complete reasoning in support of the rejections and to the brief and reply brief (Paper Nos. 14 and 16) for the appellant's arguments thereagainst.

### OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Each of independent claims 11 and 17 recites a flow device comprising a body attachable to first and second fluid supply conduits, the body having an interior channel having a first inlet for flow of water from the first supply conduit, a second inlet for flow of air from the second fluid conduit and a slotted nozzle configured to discharge the air and water in a substantially coplanar flow, the second inlet being located between the first inlet and the nozzle and the channel further including an interior dam located between the first and second inlets and forming a reduced cross-sectional area of the channel, the cross-sectional area then increasing between the dam and the second inlet.

In attempting to read claims 11 and 17, and the claims depending therefrom, on the structure of Gardenier, the examiner considers the interior channel to be the area enclosed by air jacket 18, the first inlet to be water inlet 20, the second inlet to be mixing chamber 30,<sup>3</sup> the slotted nozzle to be port 16 and the dam to be the horizontal top portion of the structure enclosing the water chamber 22. While the water inlet 20 seems reasonable to respond to the first inlet of claims 11 and 17, we agree with appellant that neither the port 16' nor the mixing chamber 30 can be considered to be a second inlet for flow of air from a second fluid supply conduit. Specifically, if the interior channel is considered to be met by the channel formed between the air jacket 18 and the water chamber 22, port 16' may reasonably be considered to be an inlet thereto. That being the case, however, the water inlet 20, which feeds to the port 16', cannot then reasonably be considered to be a first inlet to the interior channel for flow of water from the first fluid supply conduit. If, on the other hand, the interior channel is considered to be met by the combination of the air chamber 22 and the flow passage between the air chamber 22 and the air jacket 18, the water inlet 20 responds to the first inlet recited in claims 11 and 17, but the port 16' and mixing chamber 30 can best be considered to be a passage between one portion of the channel and a second portion of the channel, not an inlet to the channel.

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<sup>3</sup> We, like appellant, assume that the examiner actually intended to refer to the port 16' as the second inlet.

For the foregoing reasons, we conclude that the subject matter of claims 11 and 17 is not anticipated<sup>4</sup> by Gardenier. It follows that we cannot sustain the rejection of claims 11 and 17, or claims 12, 14-16 and 18-20 depending therefrom, as being anticipated by Gardenier.

Mersmann discloses a substantially different type of whirlpool bathtub nozzle having both a water inlet (suction openings 42) and a suction air inlet (through-bore 21 of hose connecting stub 20). We find nothing in the teachings of Mersmann which cures the above-noted deficiency of Gardenier. Thus, we also shall not sustain the rejection of claims 11, 12 and 14-20 as being unpatentable over Gardenier in view of Mersmann.

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<sup>4</sup> To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim. Karsten Mfg. Corp. v. Cleveland Golf Co., 242 F.3d 1376, 1383, 58 USPQ2d 1286, 1291 (Fed. Cir. 2001); Scripps Clinic & Research Foundation v. Genentech, Inc., 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991).

CONCLUSION

To summarize, the decision of the examiner to reject claims 11, 12 and 14-20 under 35 U.S.C. §§ 102 and 103 is reversed.

REVERSED

CHARLES E. FRANKFORT  
Administrative Patent Judge

LAWRENCE J. STAAB  
Administrative Patent Judge

JENNIFER D. BAHR  
Administrative Patent Judge

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